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In the

Supreme Court of the United States

OCTOBER TERM, 1957

No. 252

SAFEWAY STORES, INCORPORATED,

Appellant,

v.

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC. and LOUIE J. SPEED, INC.,

Appellees.

On Appeal from the Supreme Court of the State of Oklahoma

JURISDICTIONAL STATEMENT

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On Appeal from the Supreme Court of the State of Oklahoma

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Supreme Court of the State of Oklahoma which affirmed a final decree of the District Court of Oklahoma County, Oklahoma. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The majority opinion and the concurring and dissenting opinion of the Supreme Court of the State of Oklahoma are reported at *322 P. 2d 179 (Okla. 1957)*. A copy of the opinions of the Supreme Court of the State of Oklahoma, and a copy of the Final Decree and the oral opinion of the District Court of Oklahoma County, Oklahoma, are reprinted herewith as Appendix A.

JURISDICTION

This suit was instituted by the Oklahoma Retail Grocers Association, Inc., on the 25th day of October, 1954; in the District Court of Oklahoma County, Oklahoma, pursuant to the Oklahoma Unfair Sales Act, to enjoin appellant from selling groceries at prices below cost as defined in the Act. The opinion of the Supreme Court of Oklahoma was rendered on the 24th day of December, 1957, and appellant's Motion for Rehearing was denied February 11, 1958. Notice of Appeal was filed with the Clerk of the Supreme Court of Oklahoma on May 8, 1958. On July 2, 1958, for good cause shown, the Chief Justice of the Supreme Court of Oklahoma enlarged the time for docketing the case to and including August 4, 1958. The jurisdiction of this Court over this appeal is conferred by Title 28, United States Code, Section 1257(2). Cases believed to sustain the jurisdiction of this Court on appeal include *Charleston Federal Savings & Loan Ass'n v. Alderson, 324 U. S.*

888, 89 L. Ed. 857 (1945); Winters v. New York, 333 U. S. 307, 92 L. Ed. 840 (1948); and *Nebbia v. New York, 291 U. S. 502, 78 L. Ed. 940 (1934).*

STATUTES INVOLVED

This appeal involves the constitutionality of the Oklahoma Unfair Sales Act (Oklahoma Statutes 1951, Title 15, Chapter 14, Sections 598.1 through 598.11). The text of the Act is reprinted herewith as Appendix B.

QUESTIONS PRESENTED

I. Whether the Oklahoma Unfair Sales Act violates the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States because it prohibits a retail grocer from selling at prices set for the sole purpose of meeting prices of competitors selling the same articles below their statutory cost, whether the competitor's price is lawful or unlawful.

II. Whether the Oklahoma Unfair Sales Act violates the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States because it unreasonably limits the type of discount for prompt payment of cash that retailers selling at statutory cost can give to trading stamps, cash register receipts and other evidences of credit, and prohibits a retailer from reducing his price on an article in an amount equal to the value of trading stamps given by a competitor selling the same article at statutory cost.

III. Whether the Oklahoma Unfair Sales Act violates the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States because, as here applied, it prohibits appellant from giving trading stamps, cash register receipts or other evidences of credit as a discount for prompt payment of cash which have a value in excess of 3%, while appellant's competitors are under no similar prohibition.

IV. Whether the Oklahoma Unfair Sales Act violates the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States because it permits the giving of trading stamps, cash register receipts and other evidences of credit in connection with retail sales at statutory cost, but wholly fails to fix any limit on the value that the trading stamps, cash register receipts and other evidences of credit may have.

STATEMENT OF THE CASE

The record here discloses a concise case history in contemporary retail competition. As concluded by the courts of Oklahoma, competition is curtailed in its consummate exercise. A merchant can neither meet the price of a competitor, nor enjoin further sales by that competitor where that competitor sells below statutory cost without the intent and the result proscribed by the Act, or sells at statutory cost and gives trading stamps.

This is precisely the situation in which this appellant finds itself.

Oklahoma, like some thirty other states, passed a below cost sales act of general application. A violation of this act has three elements:

1. A sale below cost, computed by adding invoice or replacement cost, plus freight and cartage, plus state and federal taxes, plus a markup to cover the cost of doing business of 6% in the absence of proof of a lesser cost, and
2. The intent thereby to injure competition, and
3. As a result thereof, injury to competition.

There is a defense: meeting competition in good faith. Sec. 598.7 of the Act provides, "Any retailer or wholesaler may advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article or products of comparable quality at cost to him as a wholesaler or retailer." Here Oklahoma makes a radical departure from its sister states. All states, save only Oklahoma, excuse all sales below cost to meet competition or sales to meet lawful competition. Oklahoma excuses only below cost prices set to meet a competitor selling at his cost or above. If his price is below his cost, it cannot be met. Obviously, for many reasons, that competitor's price may be lawful though below cost.

With the passage of the Unfair Sales Act, price competition in certain grocery items ceased and they have since been sold at identical shelf prices, the statutory minimum, in virtually every grocery store in Oklahoma. The record establishes identical prices for some 1,700 members of appellee's Association. These items are called

"traffic items" in the trade and consist of different products which are most frequently sold, featured in advertising and used by consumers to compare prices.

In the summer of 1954 a number of grocers in the cities of Enid, Tulsa, Norman and Shawnee commenced selling numerous "traffic items" below statutory cost. Appellant met this competition with equally low prices. At the same time certain Oklahoma City merchants were giving trading stamps to customers who purchased traffic items at statutory cost. Appellant requested an opinion of its attorneys in Oklahoma as to whether it had the right to reduce its prices by an amount equal to the value of the trading stamps in order to meet the trading stamp competition even though the resulting prices would be below cost and was advised that such conduct was permissible under the Act. Acting on this advice, appellant reduced its prices on certain traffic items which had been featured by stamp giving merchants in Oklahoma City in an amount equal to the value of the trading stamps given by those competitors. Before these price reductions, appellant and the stamp merchants were selling these particular items at the same shelf prices but the stamp merchants were giving trading stamps in connection with their sales.

Appellees filed suit to enjoin appellant from further sales at the prices set to meet competition. Appellant filed a cross petition seeking to enjoin appellees from giving trading stamps with sales made at statutory cost.

At the close of the trial the District Court enjoined appellant

(1) from selling at less than statutory cost in violation of the Act except to meet the prices of competitors selling at their cost, and

(2) from reducing its prices on items sold at statutory cost by an amount equal to the value of trading stamps given by competitors with sales of the same items at the same prices.

The trial court made no finding that the below cost prices met by appellant were unlawful and refused to enjoin appellees from giving trading stamps with items sold at statutory cost.

Appellant was further enjoined from giving trading stamps having a value in excess of 3% of the sales prices of items sold at statutory cost with sales at such cost.

The Supreme Court of Oklahoma affirmed, stating appellant "* * * set illegal prices for the sole purpose of meeting prices of its competitors * * *." As to appellees, it said "* * * we hold that the giving of such stamps did not constitute a price cut or unfair competition, but such stamps merely constituted a discount for cash." Four Justices concurred in part and dissented in part.

RAISING THE FEDERAL QUESTIONS

Appellant did not contend that the Act on its face was invalid, although in Paragraph 9 of its original answer

it stated that denial to it of the right to meet competitive prices would result in an unconstitutional application of the Act. The federal constitutional questions were preserved in the Petition in Error filed in the Supreme Court of Oklahoma. The Supreme Court of Oklahoma in passing on this question said:

> "Safeway contends that the Unfair Sales Act is violative of certain provisions of the Oklahoma Constitution and the Constitution of the United States. However, the constitutionality of the Unfair Sales Act as amended, after *Englebrecht v. Day, et al., 201 Okl. 585, 208 P. 2d 538,* was upheld in *Adwon v. Oklahoma Retail Grocers Association, Inc., 204 Okl. 199, 228 P. 2d 376.* Therefore, the constitutional questions herein raised, being substantially the same as in the *Adwon* case, supra, we deem it unnecessary to consider the issue of the constitutionality of the Unfair Sales Act in the instant case."

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The economy of this nation has enjoyed no right more fundamental than the right to compete. Indeed, more than a right, it has been an essential to success. Generally, we believe competition to be a principal foundation, a cornerstone of our technological advances and our vast material wealth. While we have for many decades recognized certain limitations on free enterprise, competition has flourished thereby because those limitations have been designed to preserve competition.

Heretofore no sanction of government has prohibited a merchant from meeting the legal prices of his competitors selling the same goods in the same market.

Heretofore no sanction of government has required a merchant to give trading stamps.[1]

The relationship of Constitution, competition, and governmental compulsion, the most significant legal problem affecting our economic well being, is a source of considerable controversy and incertitude.

For a number of years, the highest courts of the several states have struggled with statutes restrictive of competition. They have disagreed and divided. Many statutes have fallen in the last few years. Among the fallen are sales below cost acts.[2] To date, this Court has not considered such a statute.[3]

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[1]See the note on this case, *Trade Regulations—Unfair Trade—Competition from Retailers Issuing Trading Stamps Cannot be Met by Price Reductions Equivalent to Value of Stamps, 36 Texas Law Review 691, 694*, wherein it is said, "The rule of the principal case eliminates this most potent weapon, price competition, and therefore virtually forces competitors to use trading stamps."

[2]The statutes may be divided as to types. The various types developed contemporaneously and are similar in purpose.

Forty-five states now have or have had Fair Trade Acts. The constitutionality of roughly two-thirds of these has been tested and half have failed to meet the test. The folowing states have voided these Acts: Arkansas, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Nebraska, New Mexico, Ohio, Oregon, South Carolina, Utah and West Virginia. Four of these fell last year.

The constitutional test of below cost sales acts has been less frequent. Even so, seven of these acts have been invalidated by the following states: Arizona, Colorado, Maine, Maryland, New Jersey, Oklahoma, Pennsylvania. Oklahoma and Pennsylvania statutes were re-enacted after correcting some constitutional defects.

Related acts, including geographic price discrimination and special industry laws, have been stricken in numerous instances.

[3]The trade mark-property right justification for the Fair Trade Acts is absent here.

The people, the state legislatures, the state courts, Congress and the federal courts need an exposition of constitutional rights as related to economic competition. For such an exposition, a better, more clear-cut case than this will not be found. Squarely presented here are the following questions:

1. When can a state prohibit a merchant from meeting the lawful price of a competitor?

2. When can a state limit the vital area of retail competition to the giving of trading stamps?

3. When can a state prohibit a merchant from selling below cost for the sole purpose of meeting competition?

Oklahoma, through court interpretation of its Unfair Sales Act, has done each of these things.

The question is whether these prohibitions are "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt and hence an unwarranted interference with individual liberty." *Nebbia v. New York, 291 U. S. 502, 539; 78 L. Ed. 940, 958 (1934).*

Question One

"The heart of our national economic policy long has been faith in the value of competition." *Standard Oil v.*

F. T. C., 340 U. S. 231, 248; 95 L. Ed. 239, 250.[1] Because of that faith we have jealously protected the competitive market. Now Oklahoma has arbitrarily prohibited and restricted competition in its most vital function: freedom to meet a price that a competitor is free to set.

> "[T]he essential quality of that series of acts or course of conduct which we call 'competition' is that which shall be the result of the free choice of the individual, and not of any legal or moral obligation or duty." *Meredith v. New Jersey Zinc & Iron Co., 37 A. 539, 543; 55 N. J. Eq. 211.*

Here appellant specifically met the prices of its competitors. Merchants selling below cost were met by equally low prices. The courts enjoined this without re-

[1] Illustrative of the course of economic theory as to the value of competition is found in the following quotes, one old, one new:

"The quantity of grocery goods, for example, which can be sold in a particular town is limited by the demand of that town and its neighborhood. The capital, therefore, which can be employed in the grocery trade cannot exceed what is sufficient to purchase that quantity. If this capital is divided between two different grocers, their competition will tend to make both of them sell cheaper than if it were in the hands of one only; and if it were divided among twenty, their competition would be just so much the greater, and the chance of their combining together in order to raise the price, just so much the less. Their competition might perhaps ruin some of themselves, but to take care of this is the business of the parties concerned, and it may safely be trusted to their discretion. It can never hurt either the consumer or the producer; on the contrary, it must tend to make the retailers both sell cheaper and buy dearer than if the whole trade was monopolized by one or two persons. *Great Books of the Western World*, Vol. 39, Adam Smith, "The Wealth of Nations," 1776, p. 156.

"It should be clear, from our experience thus far, that attempts to set up standards of 'fair competition' which are to mean something beyond the abstention from unfair methods or practices are only too often simply a cloak for the attempt to limit or eliminate competition. The notion that the entry of newcomers into a field, the advertising of prices or the lowering of prices are not "fair competition" has been repudiated by the courts and is without foundation in ethics, economics or law. These things are the very essence of competition; and they are 'fair competition' in every sense." Lee Loevinger, *The Law of Free Enterprise*, Funk & Wagnalls, N. Y. 1949, pp. 431.

gard to whether the prices met were legal. Merchants selling at cost were met by a price equal to their price less the value of the trading stamps they gave. The courts below enjoined further sales by appellant at this price and specifically refused to enjoin the merchants whose prices were met.

"[F]or the sole purpose of meeting prices of its competitors,"[5] appellant sold below cost. In addition to the sale below cost, the statute requires an unlawful purpose and effect to complete a violation. However, as now interpreted, when the price is set to meet competition, intent and effect are immaterial. This is striking treatment to accord so valuable a right. The Supreme Court of Minnesota exemplifies the only constitutional approach, holding that meeting competition would "fairly negate any claim that the prices are established to injure competition." *State v. Wolkoff, 85 N. W. 2d 401,407-408 (Minn. 1957).*

The occasions on which a merchant may sell below cost for lawful purposes are numberless. No industry in the economic history of western civilization has operated on a lower net profit in comparison to sales than our present retail grocers.[6] The sales price of most items on grocery shelves barely exceeds cost of the items. Good service promotions and prices are the chief competitive

[5]Quoted from the opinion of the Supreme Court of Oklahoma. See Appendix A.

[6]The industry leaders rarely make a 1% net profit on net sales. *Supermarket News*, the industry newspaper, in its June 30, 1958 issue, at page 1, reports that "for the first time in seven years A & P's ratio of net profits to net sales last year exceeded 1 per cent."

devices of the grocer. Special prices are an industry practice. Who will say a grocer has the intent to injure competition if from 7500 different items in his stock he sells one, or a handful, at half or two-thirds his cost?

But illegal intent is essential to the constitutionality of sales below cost statutes. *Fairmount Creameries v. Minnesota, 274 U. S. 1, 71 L. Ed. 893 (1927); State v. Packard-Bamberger & Co., 8 A. 2d 291 (S. Ct. N. J. 1939); Commonwealth v. Zasloff, 13 A. 2d 67 (S. Ct. Pa. 1940); Advisory Opinion of the Justices, 132 A. 2d 47 (Me. 1957).* Oklahoma has heretofore expressly recognized this. *Englebrecht v. Day, 208 P. 2d 538 (S. Ct. Okla. 1949).* Now it has said meeting competition selling below cost is in itself an illegal purpose. A grocer in Oklahoma can sell below his cost and invoke the aid of the State to prohibit his competitors from meeting his price.

In selling at cost less the value of trading stamps given by competitors selling at cost, appellant was doing no more than meeting competition. The essential nature of the conduct cannot be changed by calling trading stamps a discount for cash.[7] "What's in a name? That which we call a rose, by any other name would smell as sweet." If a discount for prompt payment of cash is permissible, and the Supreme Court of Oklahoma said

[7]This point was convincingly made by Justice Jackson for the four dissenters on the Oklahoma Supreme Court where he said, "Reasons which compel an accountant's conclusion do not compel the same legal conclusion. The issues are not the same." See Appendix A. See also, *Colgate-Palmolive Company v. Elm Farm Foods Co., 148 N. E. 2d 861 (Sup. Jud. Ct. Mass. 1958)*, wherein the court said: "There is no magic in the words 'cash discount'. When subjected to analysis they are merely a euphemism for what is in reality a price cut."

it is, then statutory cost in connection with cash sales has been redefined and is reduced by the amount of the permissible discount. This done, appellant's prices are as lawful as appellee's. They are not below cost.

The only possible distinction between the two prices is that appellant has given the customary discount for cash in the customary way, a net price for cash payment. Appellees, to give their discounts, buy trading stamps.[8] The economic benefit to the purchaser is the same in either instance. This is a distinction without a legal difference.[9]

The Oklahoma legislature stands mute on this discount. It has neither approved, disapproved, nor classified discounts for cash payment. It has said not a word. Just what it is about the price reduction which is prohibited that differs from trading stamps which are permitted that makes the former inimical to the public welfare and general safety does not appear.

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[8]The courts below have permitted cash register receipts and other evidences of credit as discounts for prompt payment of cash. These cannot compete with trading stamps because they lack allure and are more expensive to the merchant. The public equates the value of stamps to their trading value at retail prices, while the trading stamp companies purchase at a much lower price. Redemption rates are higher with evidences of credit redeemable in cash or merchandise at the place of purchase than with trading stamps.

[9]The U. S. Supreme Court in *Rast v. Van Deman, 240 U. S. 342, 360; 60 L. Ed. 679, 688 (1916)*, said: "* * * all of the schemes have a common character,—something is given besides that which is or is supposed to be the immediate incentive to the transaction of sale and purchase, —something of value given other than it * * *."

The proposition was forcefully stated by the New York Court of Appeals in the following terms: "No matter how one puts it, the customer who is accorded a cash discount in reality pays that much less for the article which he purchases, and this is nonetheless true, because the return is by way of merchandise rather than coin which may purchase merchandise." *Bristol-Meyers v. Picker, 96 N. E. 2d 177, 179 (Ct. App. N. Y. 1950)*. See also, *Colgate-Palmolive Company v. Max Dichter & Sons, 142 F. Supp. 545 (D. C., Mass. 1956)*.

The grave concern for competition exhibited by the highest courts of the states is not foreign to this Court. In one of its greatest decisions this Court expressly recognizes the constitutional right to freedom from arbitrary restraint:

> "The Constitution does not secure to any one liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." *Nebbia v. New York, supra, 291 U. S. at 539; 78 L. Ed. at 958.*

Tested by these considerations, the Oklahoma Unfair Sales Act must be condemned. The most valuable business right, freedom to meet a price that a competitor is free to set, cannot be denied.

Question Two

Assuming *arguendo*, that there is a legal difference between a price at statutory cost plus trading stamps and a price at statutory cost less the value of the trading stamps, the Oklahoma courts have created a remarkable classification of methods for giving discounts for cash payment. If a merchant would give a discount for payment of cash he can do so only by trading stamps, cash register receipts, or other evidences of credit. Trading stamps are granted a State monopoly of the cash dis-

count business.[10] The benefit to the stamp industry will extend far beyond the sales at cost, since stamps will be given with all purchases by merchants using them.

The incredible vitality of the trading stamp in today's market is difficult to conceive. In 1955, trading stamp companies grossed in excess of six hundred million dollars.[11] Surveys showed half the families in the country saving stamps.[12] Retailers offering stamps are estimated to have made 12% of all retail sales in the United States in 1957.[13] Supermarkets and other food stores are the largest dispensers of trading stamps.[14] Appeal of the

[10]It is ironic that trading stamps, after half a century of legal struggle for survival, have in Oklahoma been benefited by legislation which through inadvertence permits their use to the exclusion of other forms of competition. At the same time 1955 saw bills restricting and taxing trading stamps introduced in half of the legislatures in the nation. See *Trading Stamps: A Challenge to Regulation of Price Competition, 105 U. Pa. L. Rev. 242.* Cases which have sustained legislation directly prohibiting trading stamps or placing prohibitive taxes on them include: *Rast v. Van Deman, 240 U. S. 342, 60 L. Ed. 679 (1916); Tanner v. Little, 240 U. S. 369, 60 L. Ed. 691 (1916); Pitney v. Washington, 240 U. S. 387, 60 L. Ed. 703 (1916); Gamble v. Montgomery, 39 So. 353 (1905); Lansburgh v. District of Columbia, 11 App. D. C. 512 (1897); District of Columbia v. Kraft, 35 App. D. C. 253 (1910), cert. denied 218 U. S. 673, 54 L. Ed. 1205 (1910); District of Columbia v. Gregory, 35 App. D. C. 271 (1910); cert. denied, 218 U. S. 673, 54 L. Ed. 1205 (1910); Sperry & Hutchinson Co. v. State, 122 N. E. 584 (1919); State v. Wilson, 168 Pac. 679 (1917); State v. Crosby Bros., 176 Pac. 321, 670; State v. Merchants Trading Co., 38 So. 443 (1905); State v. Underwood, 71 So. 513; State v. J. M. Seney Co., 107 Atl. 189; Fleetwood v. Read, 58 Pac. 665 (1899); Oilure Mfg. Co. v. Pidduck-Ross Co., 80 Pac. 276 (1910); Sperry & Hutchinson Co. v. Tacoma, 122 Pac. 1060 (1912); Sperry & Hutchinson Co. v. Melton, 71 S. E. 19 (1911); State ex rel. Sperry & Hutchinson Co. v. Weigle, 166 N. W. 54 (1918).* As many cases have invalidated such legislation.

[11]"Do Trading Stamps Affect Food Costs?" p. 1, Marketing Research Report No. 147 (Jan. 1957), U. S. Dept. of Agriculture.

[12]"Trading Stamp Practice and Pricing Policy," Albert Haring and Wallace O. Yoder. Interim Release (May 7, 1957), School of Business, Indiana University.

[13]"Who Profits From Trading Stamps?" Eugene R. Beem, Harvard Business Review, Nov.-Dec., 1957, pp. 123-136.

[14]"Trading Stamps," Bureau of Business Research, Indiana University School of Business, Indiana Business Report No. 21, Harvey L. Vredenberg, p. 24.

trading stamps to consumers must not be underestimated. "The reasons for strong consumer acceptance of stamps appear to be basically economic. Most stamp savers do not think store prices have been marked up as the result of stamps, so premiums are regarded as an actual plus for the family's well-being."[15]

Volume of sales usually increases substantially when a merchant commences using trading stamps.[16] A recent national survey involving 304 dealers using trading stamps shows the increases in sales attributed to the use of trading stamps in food stores for the first half of 1956 as compared to the corresponding period in 1955. Supermarkets achieved an increase in volume of sales averaging 10.2% where trading stamps were given as compared to a 6.7% average for stores not giving trading stamps.[17] It is practically an economic necessity to meet this stamp competition in some way. There is a tremendous body of trading stamp literature.[18]

In Oklahoma virtually all families will have to save stamps to get the most for their grocery dollar. This is obviously no protection to competition.

A merchant cannot give items of merchandise as a cash discount because of the combined price, tie-in sales provision of the Act.[19] A merchant cannot give cash as a

[15] "Who Profits from Trading Stamps," at pp. 125-129, supra, ft. note 13.

[16] "Do Trading Stamps Affect Food Costs," p. 2, supra, ft. note 11.

[17] "How Trading Stamps Affect Volume and Earnings," J. J. Trout, Progressive Grocer, vol. 35(8):48-55 (Aug., 1956).

[18] See for example the six page bibliography in "Trading Stamps," supra, ft. note 14.

[19] See Sec. 598.2(d), Oklahoma Unfair Sales Act.

cash discount because the courts here prohibited Safeway from just this. Only trading stamps and evidences of credit are left.

Oklahoma can permit discounts, prohibit discounts, or make reasonable classification of permissible discounts. It has done none of these.

This arbitrary restriction is wholly irrelevant to any purpose the legislature was free to adopt. There was no evil in methods of discounting for cash payment before the legislature. These discounts were not even considered in connection with sales at retail. Through advertence the legislature could not classify discounts as has been done. Through inadvertence the same end cannot be achieved.

This is an unwarranted interference with individual liberty, the denial of a substantial right. Freedom of choice is denied, yet economic well being, if not survival, requires use of the discount where competition does so. It is no wonder appellant now gives trading stamps in Oklahoma.

Why should the merchants of Oklahoma be refused the right to give the type of discount they choose? We are a commercial people. Many Americans express themselves only through their business for this is their chief concern, their life. To stifle needlessly that expression is as crippling to those persons as is refusal of the right to the anarchist to express his political philosophy in Boston Commons.

Why should the citizens of Oklahoma be denied the right to buy at the lowest net price prescribed by the legislature? Why should they be forced to buy two things, that which they desire and a trading stamp?

As construed, the Oklahoma Unfair Sales Act is arbitrary, discriminatory, demonstrably irrevelent to any policy the legislature was free to adopt and a tragically unnecessary and unwarranted interference with individual liberty.

Questions Three and Four

These two questions arise not because of the statute but because of its interpretation by the Supreme Court of Oklahoma. Without any support in the language of the statute and without any evidence of such an intention on the part of the Legislature, five Justices of the Supreme Court of Oklahoma have found that discounts for cash payment made in connection with sales at retail do not violate the Unfair Sales Act. Four Justices have said, "The Act does not authorize discounts for cash in retail sales."[20]

By permitting the discount for cash in the form of trading stamps, the courts created more problems than they solved. There is no fixed value to a trading stamp. Use of stamps can easily destroy the efficacy of the statute.[21] Once permitted, they must then be regulated,

[20] See Appendix A.

[21] Waller, Herman S., *Crafty Evasions Threaten Fair Trade*, pp. 1-28. Legal Counsel for National Association of Retail Druggists, 1955. Anti-concession clauses have been added to some twenty state Fair Trade Acts. They prohibit the giving of trading stamps in connection with sales at the fair trade price.

for the merchant can give a discount of any value he might choose. The Oklahoma courts, having permitted the discount, have attempted to regulate it piecemeal. Without any evidence in the record, the trial court here fixed a limit on the value of trading stamps that appellant might give at 3%. Neither a court of law nor a court of equity can meet the problem this way for there can be no equal protection. No other merchant in the State of Oklahoma is limited as is this appellant. It is inconceivable that every district court in the State could arrive at the 3% figure imposed upon this appellant in the cases which come before them.

Moreover, violation of this Act is a misdemeanor punishable by a fine. Yet no merchant in Oklahoma can know whether his price is in violation of the Act because the Act affords him no opportunity to determine whether a discount for cash that he might give in connection with a sale at retail is within the limits that a court might later fix on the discount. This Court has said:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process at law." *Connally v. General Construction Co., 269 U. S. 385, 70 L. ed. 322, 328 (1926).*

CONCLUSION

This appeal brings before this Court substantial federal questions both in terms of the far-reaching legal questions involved and in the practical effect on our national economic policy. The questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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PROOF OF SERVICE

I, Ramsey Clark, one of the attorneys for Safeway Stores, Incorporated, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of , 1958, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

On Oklahoma Retail Grocers Association, Inc., a corporation, and Louie J. Speed, Inc., a corporation, by mailing copies in duly addressed envelopes, with airmail postage prepaid, to their respective attorneys of record, as follows:

Miskovsky & Miskovsky, Hightower Building, Oklahoma City, Oklahoma;

William J. Holloway, Sr., First National Building, Oklahoma City, Oklahoma;

Looney, Watts, Looney & Nichols, First National Building, Oklahoma City, Oklahoma;

Samuel M. Lane, 26 Broadway, New York City, New York.

RAMSEY CLARK,
1900 Adolphus Tower,
Dallas 2, Texas,
Attorney for Safeway Stores, Incorporated.

APPENDIX A

1. Decision of the Supreme Court of the State of Oklahoma.

Safeway Stores, Incorporated v. Oklahoma Retail Grocers Association, Inc., and Louie J. Speed, Inc.

In the Supreme Court of the State of Oklahoma. No. 37326. Filed December 24, 1957.

Appeal from the District Court of Oklahoma County, Oklahoma. Hon. F. B. H. SPELLMAN, Assigned Judge.

JOHNSON, Justice: This is an action brought by Oklahoma Retail Grocers Association, Inc., a corporation against Safeway Stores, Incorporated, a foreign corporation, to enjoin it from selling groceries below cost in violation of the Oklahoma Unfair Sales Act, 15 O. S. 1951, Sec. 598.1-598.11.

The Safeway Company by cross-petition made Louie J. Speed, Inc., a corporation, and other grocers parties defendant. Safeway in its cross-petition asked for injunctive relief against Speed, et al., alleging that they, as its competitors, had violated the Unfair Sales Act.

Safeway in its answer admitted selling groceries below minimum statutory cost, but denied that its advertisement, offer for sale, or sale of the alleged articles, was in violation of the Oklahoma Unfair Sales Act, and alleged that its prices were made in good faith to meet the prices of its competitors who were, on the dates complained of, selling

the same articles or products of comparable quality at such prices, or below minimum cost by giving trading stamps in violation of the Unfair Sales Act.

In the trial of the case Speed admitted that it issued single trading stamps to its customers on all purchases of groceries, and on certain days that it issued double stamps, and that sales below the statutory cost were accomplished by use of even the single stamps, but contended that the stamps were in the nature of a cash discount and not violative of the Unfair Sales Act.

The court issued a permanent injunction against Safeway prohibiting it from advertising, offering for sale or selling merchandise below the minimum prices as fixed by the Oklahoma Unfair Sales Act.

As to Speed, the court found that the giving of stamps in accordance with the trading stamp contract was in the nature of a cash discount and not in violation of the Unfair Sales Act, but made permanent the injunction restraining Speed from issuing or giving double stamps to its customers with purchases of merchandise.

Safeway and the Retail Grocers Association and, by agreement, Speed, were the only parties involved in the trial, and Safeway alone appeals.

Safeway contends that the Unfair Sales Act is violative of certain provisions of the Oklahoma Constitution and the Constitution of the United States. However, the constitutionality of the Unfair Sales Act as amended, after *Englebrecht v. Day et al.*, 201 Okl. 585, 208 P. 2d 538, was up-

held in *Adwon v. Oklahoma Retail Grocers Association, Inc.*, 204 Okl. 199, 228 P. 2d 376. Therefore, the constitutional questions herein raised, being substantially the same as in the *Adwon* case, *supra*, we deem it unnecessary to consider the issue of the constitutionality of the Unfair Sales Act in the instant case.

Many cases from other jurisdictions and authorities have been cited and quoted from by all parties involved in this lawsuit. But a study of them clearly indicates a large variety of statutes, differing materially from ours in concept, if not in purpose, to such an extent that we deem it unnecessary to refer to all such cases herein by citing and considering them.

We are concerned herein only in the interpretation and application of Oklahoma's Unfair Sales Act as applied to the particular facts in this case. See 15 O. S. 1951. Sec. 598.1, *et seq.*, Laws of 1949, p. 103, Sec. 1, *et seq.* We must construe and interpret the Unfair Sales Act so as to give it practical meaning and effect within the legislative intent. However, until a proper factual case is presented which requires a clear determination and offers a practical situation in which all the conflicting problems and considerations of the area involved are [present,] this court will refrain from theorizing. This is particularly true in cases involving the field of economic regulation. The eventual goal of any interpretation must be viewed in the practical situation existing in the field to be regulated.

Safeway contends that it was not and is not amenable to injunctive restraint from admittedly selling merchandise below the stautory cost under the Unfair Sales Act, 15 O. S. 1951, Sec. 598.3, because under Sec. 598.7 of the Act it had the right to advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who was selling the same article or products of comparable quality at cost to it as a retailer. It seeks to justify its price cutting action on the ground that when its competitors gave trading stamps, cash register receipts or things of like nature of such value with their sales of merchandise, which in effect reduced the price of their merchandise below minimum cost, that that constituted sales below cost or price cutting in violation of the Unfair Sales Act, and that it had a right to meet such competition by reducing its prices to the extent of the value of the trading stamps.

In other words, Safeway contends that its action was justifiable because of the alleged wrongful acts of its competitors, and that its actions in the premises constituted "good faith" in accord with Sec. 598.7, which exempted it from the injunctive provisions of Sec. 598.5 of the Unfair Sales Act. We do not agree.

In this connection our attention has been called to the recent case (10-4-57) of *State v. Wolkoff*, (Minn.) 85 N. W. 2nd 401, wherein it was held that "(I)f a merchant in good faith sets the price of an article on the basis of a competitor's price, which price he in good faith believes to be a *legal one*, there is no violation," which clearly is not the case herein. In the instant case, Safeway obviously and

admittedly did not, in good faith, set the price of its articles which were subject to the Unfair Sales Act on the basis of its competitors' prices, which it in good faith believed to be legal prices under the Unfair Sales Act, but on the contrary it set illegal prices for the sole purpose of meeting prices of its competitors, which it thought to be illegal.

In considering unfair sales practice acts from a procedural viewpoint, commentators have observed the wisdom of the legislatures in providing the remedy by injunction, and the increasing tendency of the courts to enjoin, at the suit of competitors, repeated violations affecting the unfair conduct of business. Availability of the injunctive remedy and that of interlocutory decree based on actions therefor precludes the practice indulged in by many fair minded competitors immediately to meet competition by resorting to the same practices themselves. Since actions for injunctions may be filed by a trade association for the benefit of all its members, the practice of resorting to the same practices to meet competition is materially reduced, for the natural restraint against suing a competitor is less present in the seeking of immediate relief against threatened piratical price wars. 10 So. C. L. Rev. 22. See also 21 Iowa L. Rev. 175, 236; 42 Harv. L. Rev. 693; 13 Tex. L. Rev. 136; and 25 Cal. L. Rev. 1088, and cited cases.

We are of the opinion that this injunction granted by the trial court against Safeway was proper, because under our statute the appropriate remedy was by injunction and not by retaliation or retaliatory action, such as was prac-

ticed by Safeway. In this respect the judgment of the trial court is affirmed.

We come now to Safeway's cross-petition and its contention that the trial court erred in refusing to enjoin Speed and restrain him from distributing trading stamps with articles priced at the minimum under the Unfair Sales Act.

Safeway's cross-petition charged that Speed by the use of trading stamps was selling his merchandise below the statutory minimum cost in violation of the Unfair Sales Act.

Speed in his answer to the cross-petition admitted that he was a retail grocer, in competition with Safeway; that for a number of years he had been distributing S & H trading stamps with all merchandise, including those items which were offered for sale at the statutory minimum; that the stamps were worth approximately 2.5 percent of the sales price of the merchandise, but did not deduct the sales price because they constituted the only practical means of allowing a discount for cash.

Speed defends on the grounds that single trading stamps (the court having enjoined him from issuing double stamps on his sales) do not reduce the price of merchandise, but constitute only a discount for cash on his sales.

In recent years there have been many appellate court decisions dealing with the subject of trading stamps, and several Law Review articles have been written concerning them and their legal effect upon economic regulatory measures. See cited authorities *supra* and *infra*.

An extensive article appears in 105 Pa. L. Rev. 242, *et seq.* entitled "Trading Stamps: A Challenge to Regulation of Price Control" wherein in referring to trading stamps it is said (quoting from Wall St. Journal, April 23, 1956, p. 1, col. 6.):

> "Assailed by some 'as a costly device that raises family food bills' and hotly defended by others as 'a perfectly legal promotional tool,' trading stamps have become a center of controversy in the merchandising field. Though stamp plans have enjoyed a rapid upsurge in growth since World War II, the idea itself is over fifty years old." (See 24 Tenn. L. Rev. 557-58, 1956.)

Description of the various stamp plans may be found in 24 Tenn. L. Rev. *supra.* However, there being no statute in Oklahoma prohibiting the use of trading stamps as such, we are concerned herein only with the application of and/or relation of trading stamps to unfair competition and below cost sales under our statute; see "The Unfair Sales Act," Laws 1949, p. 103, Sec. 1, *et seq.*; 15 O. S. 1951, Sec. 598.1, *et seq.*, which as noted by the title of the Act, is designated as

> "An Act defining and prohibiting unfair sales practices with a view to preventing the advertising, offering for sale, or the selling of merchandise below cost for the purpose of injuring competitors, destroying, or substantially lessening competition; providing remedies for violation thereof; establishing a penalty therefor, etc."

The question of whether giving trading stamps in the usual manner with merchandise sold at the statutory minimum constitutes a disguised form of price cutting in violation of our Unfair Sales Act, or whether they (trading

stamps) are to be regarded as a discount for cash, as a means of advertising, a device to entice customers and to retain their trade, is new in this jurisdiction, and our decision on this matter will be one of first impression. It is a question upon which appellate courts, economists and accountants have diverse and conflicting opinions.

The question has, however, been considered by the courts of California and Utah, which states have statutes similar and comparable to ours in content and substantially identical to ours in purpose on unfair trade practices and fair trade contracts. See Cal. Bus. & Prof. Code, Fair Trade Contracts, Sec. 16900-16905, Unfair Trade Practices, 17000-17100, and *Food and Grocery Bureau v. Garfield* (Cal.) 125 P. 2d 3; *Weco Products Co. v. Mid-City Cut Rate Drug Stores, et al.* (Cal.) 131 P. 2d 856, and cited cases. See also the Utah case, *Trade Commission v. Bush* (1953), 259 P. 2d 304, and cited cases, and Utah statute cited in footnote of the case.

In the case of *Food and Grocery Bureau v. Garfield, supra*, there was no contention as herein that the use of the stamps resulted in sales of commodities below cost under the Unfair Sales Practices Act, but it was said in that case that

> "(I)t is well settled by the decisions of this Court, as well as other jurisdictions, that the practice of merchants in issuing trading stamps with the purchase of articles is merely a method of discounting bills in consideration for the immediate payment of cash." Citing cases.

In the California case of *Weco Products Co. v. Mid-City Cut Rate Drug Stores, et al., supra*, the question of price

cutting or selling below cost was involved, and the factual situation was similar, if not identical, to the case herein, except that the latter case involved the Fair Trade Act and the case before us involves the Unfair Sales Practices Act which was true of the California case of *Food and Grocery Bureau v. Garfield, supra*, but the court made no distinction in the application of the cash discount rule to the Fair Trade and Unfair Sales Practices Acts. In the *Weco Products Co.* case, *supra*, it was said:

> "Defendant, even antedating plaintiff's availing itself of the protection of the Fair Trade Act, regularly gave to his customers trading stamps at the rate of one stamp with each ten cents of the sale price of articles purchased. These were given on purchases of any of the thousand and one things sold in defendant's drug stores, with the exception of liquors. At infrequent intervals there were 'double stamp days,' when two stamps were given for each unit of sale price. Upon each stamp was imprinted 'Cash Discount Stamp.' Each stamp had a cash value of two mills. Stamps were given to every customer paying cash at the time of purchase and requesting trading stamps. They were redeemed by defendant upon presentation of five hundred stamps collected in a book given by defendant to customers for that purpose, redemption value for a book of five hundred being $1.00 cash or, at the option of the purchaser, $1.25 merchandise.
>
> "Inasmuch as trading stamps were given by defendant upon sales of plaintiff's commodities, plaintiff contends that the scheduled minimum prices of his commodities were reduced by exactly the amount of the cash value of the stamps, to wit, by two mills upon each ten cents. In other words, plaintiff insists that the giving of trading stamps was in reality a disguised form of price cutting.

"The question before us for consideration, therefore, may be stated as follows: Does the giving of trading stamps, redeemable for cash or merchandise, constitute a violation of the Fair Trade Act when such stamps are given with commodities sold at the minimum prices stipulated by the producer under said act? This query is best answered, we believe, by a consideration of the nature and purpose of the trading stamp coupons. Are they to be regarded as a discount for cash, as a means of advertising, a device to entice customers and to retain their trade, or do they simply represent a cut in the sale price of the articles with which they are given? If the latter, they accomplish a cut in the established price of merchandise; and where such merchandise is sold at minimum Fair Trade Act prices, the giving of trading stamps then amounts to a sale below such prices.

"If, however, the stamps are given by the merchant in the nature of an inducement to customers to attract them to his store, the practice is in the nature of an advertising device, and is no more to be condemned as violative of the Fair Trade Act than would be such commonly employed devices as free parking room, care of infants and other plans offered by some mercantile establishments in competition with their rivals. Free parking for automobiles of customers might be said to result in a lesser price paid by a customer for goods purchased, yet it could hardly be reasonably contended that thereby a violation of the Fair Trade Act had been worked.

"Neither can it be asserted that by giving discounts for cash the terms of the statute in question are contravened. A cash discount is a reward for prompt payment. It is a trade practice long established, and is authoritatively recognized as being not a deduction from the purchase price. Montgomery, Auditing Theory and Practice, pp. 499-500.

"*Consideration of such authorities as are available leads us to the conclusion that the giving of trading*

stamps as in the instant now before us does not effect a reduction in the price of the articles sold such as to constitute a violation of the Fair Trade Act. The matter has not been passed upon by the appellate courts of this state. *However, aside from the consideration of the Fair Trade Act, the status of trading stamps is definitely fixed in this state as being a discount for 'the immediate payment of cash.'* This pronouncement finds its latest expression in the case of *Food and Grocery Bureau v. Garfield*, 20 Cal. 2d 228, 125 P. 2d 3, 5, decided April 28, 1942, where the defendant is the same as in the instant case and where the very trading stamps as in the instant case and where the very trading stamps here involved were under consideration. *It is true that the Food and Grocery Bureau case involved a different statute, the Unfair Practices Act rather than the Fair Trade Act, but the ruling of the court must be regarded as conclusive of the status of the trading stamp in commercial retail business.*

" *'It must be concluded,'* says the court in the Unfair Practices Act case, *'that the trading stamp plan adopted by the appellant * * * is a discount given the customer in consideration of his paying cash.'* And at page 6 of 125 P. 2d: *'It is well settled by the decisions of this Court, as well as those in other jurisdictions, that the practice of merchants in issuing trading stamps with the purchase of articles is merely a method of discounting bills in consideration for the immediate payment of cash.'*

"This latter pronouncement is buttressed by numerous citations to decisions in California and other jurisdictions, where trading stamps are characterized as 'merely one way of discounting bills in consideration for immediate payment in cash.' *Ex parte Hutchinson*, C. C., 137 F. 950, 951; 'a benefit to the customer, who practically receives a discount, and who will buy more cautiously and judiciously if he pays cash,' *Winston v. Beeson*, 135 N. C. 271, 47 S. E. 457, 461, 65 L. R. A. 167, and 'a convenient means of allowing or granting

a discount to the merchants' customers on small as well as on large purchases which were paid for in cash', *State v. Holtgreve*, 58 Utah 563, 200 P. 894, 897, 26 A. L. R. 696.

"To denominate appellant's trading stamp plan as a device for giving a discount for cash payment on merchandise, rather than as a cut in price upon the articles sold, gains force when we consider that the stamps are given uniformly and without regard to the type of goods sold or the purchaser of the same. The only condition is that cash be paid for the purchases. Respondent's 'Fair Trade' minimum-priced articles are not singled out by appellant as objects to which alone the trading stamp privileges attach. No discrimination is made for or against them. The policy may be said to be of uniform application both as to goods sold and as to purchasers of the same, and logically falls into the classification of 'cash discount' rather than 'price cut' " (Italics ours).

The California rule is expounded in the above quotation holding that giving of trading stamps with purchases of merchandise sold at the minimum price under the Unfair Sales Practice Act is not a violation of the Act because the stamps represent a "cash discount" which, according to accounting procedure, is a cost of selling rather than a reduction in price, is a rule of long standing. In 105 Pa. L. Rev. 248, in discussing discounting procedures, it was said:

"While in the case of stamps a stronger argument may be made for treatment as a selling cost, since seller receives in cash the full list price regardless of the discount in stamps and must therefore account for the cash income as well as for his payment to the stamp company for the use of the stamps."

As early as 1904 in *Ex parte Hutchinson*, 137 Fed. 949, the Court, in nullifying anti-trading stamp legislation, said:

> ". . . (T)he giving of trading stamps is merely one way of discounting bills in consideration for immediate payment in cash, which is a common practice of merchants, and is doubtless a popular method, and advantageous to all concerned, and it is not obnoxious to public policy. . . ."

In the same year (1904) in *Winston v. Beeson*, 135 N. C. 271, 47 S. E. 457, the court in holding that the issuance of S & H stamps did not constitute a "gift enterprise" said:

> "We can discern no practical difference between this arrangement of the parties and one by which the merchant agrees to discount his bills where cash is paid by his customer at the time of purchase, and the giving of stamps redeemable at a store of another in goods to be selected by the holder, instead of an actual discount by the merchant, does not in law vary the case or change the real and substantial character of the transaction * * *"

In 1922, in the case of *Sperry & Hutchinson Co. v. Siegel-Cooper & Co.*, 225 Ill. App. 540, aff'd 309 Ill. 193, 140 N. E. 864, (1923) in 225 Ill. at page 548, the court referred to the practice as follows:

> "The practice of giving trading stamps to customers buying merchandise at retail constitutes a method of discounting the bills in consideration of prompt payment in cash. This is a common practice among merchants advantageous to all concerned. * * *"

In 1942 the same rule was applied in *Food and Grocery Bureau Inc. v. Garfield, supra.*

In 1951 in *Sperry & Hutchinson Co. v. Hudson*, 190 Ore. 458, 226 P. 2d 501, the court said:

> "In a practical sense, the issuance of these trading stamps to cash customers is simply a method adopted for giving these purchasers a discount for cash. By the use of these stamps discounts are available on small purchases. As explained by the witness Shirer, vice president of plaintiff corporation: 'There is no coin small enough to give a discount on a ten or fifteen cent purchase.' By the issuance of one of these stamps for each ten cent purchase, such a discount is made possible."

In 1954 in *Sperry & Hutchinson v. Margetts*, 15 N. J. 203, 104 A. 2d 310, the court held that giving trading stamps was a form of discount for cash and "should be treated as a non-operating item, rather than as a deduction from sales price."

And as late as December of 1956, in *Gever v. American Stores Co.*, 487 Pa. 206, 212, 127 A. 2d 694, the court said:

> "Viewed realistically, the giving of trading stamps may be regarded as nothing more than the equivalent of a normal cash discount, which is merely a term of payment and not a price reduction. Indeed, in a sense, the stamps have no value in themselves but acquire it only if the stipulation amount of other purchases is made. They cannot be regarded as cutting prices any more than free delivery service or free parking could be so regarded although these are practices which obviously save money for the customers of stores offering such advantages. Accordingly, the use of trading stamps, pursued as a general business practice by a commercial establishment, does not violate either the letter or the spirit of the Fair Trade Act."

Generally, the law of trade regulations has moved swiftly, and our statutes relating thereto are relatively new; how-

ever, from an examination of our statutes and those of other states, together with appellate court decisions construing same, we conclude that the weight of law, logic and reason clearly and distinctly show that the practice of giving trading stamps in the usual customary manner does not amount to, nor will it sustain a charge of price cutting.

The trial court did not err in refusing injunctive relief to force Speed, who was giving single trading stamps in the usual manner and in accord with a court order enjoining him from giving double stamps, to price his merchandise at statutory markup plus the value of the single stamps issued in the usual manner to the consumers, and we hold that the giving of such stamps did not constitute a price cut or unfair competition, but that such stamps merely constituted a discount for cash.

Therefore the judgment as to Speed is affirmed.

Concur: WELCH, C. J., CORN, V. C. J., and DAVISON and CARLILE, JJ. Concur in part and dissent in part: HALLEY, WILLIAMS, BLACKBIRD, and JACKSON, JJ.

JACKSON, Justice: Concurring in part and dissenting in part.

Sales at retail below cost, as defined in the Act, are prohibited. 15 O. S. 1951, §598.3.

Speed is selling, or giving, two articles for the price of one. Speed does not admit that this constitutes selling below cost nor does the majority opinion specifically so hold. Speed argues, and the majority agrees, that Speed is giving a discount for cash.

The Act does not authorize discounts for cash in retail sales. It does not authorize any scheme or device that would result in sales below "cost to the retailer." We are not dealing herein with sales at wholesale or by the manufacturer wherein discounts for cash appear to be authorized by §598.2(a) of the Act.

Insofar as material here §598.2(a) defines "cost to the retailer" in substance as invoice cost, plus freight, plus a 6 percent markup to cover a part of the cost of doing business.

Speed was selling items at "cost to the retailer" (Speed) but in addition was giving trading stamps to the purchaser. The stamps were valued at 2.5 percent. That is, if a pound of coffee cost Speed $1.00, as defined in "cost to the retailer," Speed was selling the coffee at $1.00 and giving the customer a stamp.

Even if it could be said that a cash discount by the retailer is authorized, the foregoing practice does not constitute a discount for cash in the ordinary acceptance or understanding of the term. A "discount for cash" ordinarily connotes a taking away, or reduction. The word "discount" is defined in Webster's New International Dictionary as follows:

> "Discount. 1. To deduct from an account, debt, charge, or the like; to make an abatement of; as, to discount a per cent of a bill for early payment."

In Black's Law Dictionary "Discount" is defined as follows:

> "Discount. In a general sense, an allowance or deduction made from a gross sum on any account whatever."

In Black's Law Dictionary "Cash Discount" is defined as follows:

> "A deduction from billed price which seller allows for payment within a certain time. *Leonard v. U. S.*, Ct. Cl., 7 F. Supp. 295, 297."

Speed is not giving a discount for cash but is selling two articles for the price of one. Under tthe illustration above given Speed is selling a pound of coffee and a stamp for $1.00 which, together, cost One Dollars and Two and One-Half cents. This is contrary to an express provision of the statute. §598.2(d) provides in substance that when one or more items are advertised or sold with one or more other items at a combined price, or offered as a gift, or given with the sale of any one or more other items, each of said items shall be deemed to be advertised or sold, and the price of each item named shall be governed by the definition of "cost to the retailer."

We have been furnished extensive briefs citing decisions from other jurisdictions. Most of these decisions seem to be influenced by experts in the field of accounting and auditing. Experts in these fields testified in this case. Reasons which compel an accountant's conclusion do not compel the same legal conclusion. The issues are not the same. Accountants are concerned with auditing principles. We are concerned with the meaning of the Act as intended by the Legislature.

In my opinion the injunction against Safeway was proper. Safeway does not contend that it has a right to sell below cost. It does contend that it had a right to meet

Speed's prices. §598.7 of the Act authorizes a retailer to sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article at cost to him (competitor). Safeway was taking 2.5 percent from cost. Speed was adding or giving 2.5 percent above cost. But if it could be admitted that Safeway was meeting competition it was meeting unlawful competition. An illegal price on Speed's part would not authorize an illegal price on Safeway's part. This is one of the evils that the Act seeks to prevent.

For the reasons assigned, I respectfully concur in the order enjoining Safeway from selling below statutory cost and dissent to the opinion wherein it authorizes Speed to give stamps on articles sold at statutory cost.

I am authorized to say that HALLEY and BLACKBIRD, JJ. concur in the views herein expressed.

2. Final Decree of the District Court of Oklahoma County, State of Oklahoma.

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

OKLAHOMA RETAIL GROCERS ASSOCIATION, INC.,
a corporation,

Plaintiff,

v.

SAFEWAY STORES, INC.,
a foreign corporation,

Defendant.

No. 134,533.

FINAL DECREE

This cause came on regularly for trial on the 17th, 18th and 21st days of October, 1955, before F. B. H. SPELLMAN, Assigned Judge of the District Court within and for Oklahoma County, State of Oklahoma, sitting without a jury, upon the petition of the plaintiff, Oklahoma Retail Grocers Association, Inc., a corporation, and the cross-petition of the defendant, Safeway Stores, Inc., a corporation, against the plaintiff, Louie J. Speed, Inc., d.b.a. Speed's Food Market #1; and

MISKOVSKY and MISKOVSKY, by GEORGE MISKOVSKY: W. J. HOLLOWAY, SR.: LOONEY, WATTS, ROSS, LOONEY & NICHOLS, by M. A. Ned LOONEY and CLYDE J. WATTS: DAVID S. MACLAY (of New

York City); and CASEY, LANE & MITTENDORF (of New York City), by SAMUEL M. LANE and ROBERT BESHAR, appeared as counsel for the plaintiffs; and

EMBRY, CROWE, TOLBERT, BOXLEY & JOHNSON, by V. P. CROWE and JOHN W. SWINFORD, appeared as counsel for the defendant; and

The Court, having heard the testimony and having examined the proofs offered by the respective parties, and being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, summarized as follows:

1. That, on the dates set forth in plaintiff's petition, in Oklahoma City, Midwest City, Tulsa, Enid, Shawnee, and Norman, defendant, Safeway Stores, Inc., a foreign corporation, and the agents, servants, clerks, and employees of said defendant, and all persons acting by or under the authority of said defendant, did advertise for sale, offer for sale, and sell certain selected traffic items of merchandise at the prices therein set forth, all of which prices were below the minimum price allowed by the Oklahoma "Unfair Sales Act".

2. That, on the dates set forth in plaintiff's petition, in Oklahoma City and Midwest City, when defendant, Safeway Stores, Inc., a foreign corporation, and the agents, servants, clerks, and employees of said defendant, and all persons acting by or under the authority of said defendant, reduced its prices as aforesaid, below cost to the retailer, allegedly to offset in good faith the value of trading stamps issued as a discount for the prompt payment of cash by certain of defendant's competitors, such advertising for sale, offering for sale, and selling at less than cost to the retailer was not in good faith to meet the prices of competitors selling the articles at cost to them as retailers as de-

fined by the Oklahoma "Unfair Sales Act"; and such advertising for sale, offering for sale, and selling by the defendant, Safeway Stores, Inc., was without legal justification.

3. That, on the dates set forth in plaintiff's petition, in Tulsa, Enid, Shawnee, and Norman, when defendant, Safeway Stores, Inc., a foreign corporation, and the agents, servants, clerks, and employees of said defendant, and all persons acting by or under the authority of said defendant, reduced its prices below cost to the retailer as aforesaid, allegedly to meet in good faith the prices of competitors who were on those dates selling the same articles or products of comparable quality at such prices, such advertising for sale, offering for sale, and selling by the defendant, Safeway Stores, Inc., at said reduced prices was not in good faith to meet the prices of competitors selling the articles at cost to them as defined by the Oklahoma "Unfair Sales Act" but was the meeting of prices which the defendant, Safeway Stores, Inc., either knew or had reason to know were illegal prices and was therefore without legal justification.

4. That, on the dates set forth in plaintiff's petition, in Oklahoma City, Midwest City, Tulsa, Enid, Shawnee, and Norman, defendant, Safeway Stores, Inc., a foreign corporation, and the agents, servants, clerks, and employees of said defendant, and all persons acting by or under the authority of said defendant, did advertise for sale, offer for sale, and sell the specified items of merchandise at less than cost to the retailer as defined by the Oklahoma "Unfair Sales Act" with the intent and purpose of unfairly diverting trade from its competitors, which acts constituted unfair competition, were contrary to public policy, and were in violation of the Oklahoma "Unfair Sales Act".

5. That, on the dates alleged in defendant's cross-petition, the plaintiff, Louie J. Speed, Inc., d.b.a. Speed's Food Market #1, and the agents, servants, clerks, and employees of said plaintiff, and all persons

acting by or under the authority of said plaintiff, by the acts of selling merchandise at cost to the retailer as defined by the Oklahoma "Unfair Sales Act" and issuing trading stamps therewith as a discount for the prompt payment of cash did not thereby advertise for sale, offer for sale, or sell merchandise, as alleged, at a price lower than the minimum price allowed by the Oklahoma "Unfair Sales Act".

6. That the issuing of single trading stamps, in accordance with the trading stamp contract, said trading stamps having a value not in excess of three percent of the purchase price of the merchandise, constitutes a discount for the prompt payment of cash, which discount does not reduce the price in violation of the Oklahoma "Unfair Sales Act".

NOW, THEREFORE, BY REASON OF THE LAW AND THE FINDINGS AFORESAID:

IT IS HEREBY ORDERED, ADJUDGED and DECREED by the Court that the defendant, Safeway Stores, Inc., a foreign corporation, and the agents, servants, clerks, and employees of said defendant, and all persons acting by or under the authority of said defendant, be, and they are each hereby perpetually enjoined and restrained from advertising for sale, offering for sale, and selling, at retail, any items of merchandise handled by defendant, in or through any of the stores of said defendant within the State of Oklahoma, at prices which are less than cost to the retailer as defined in the Oklahoma "Unfair Sales Act" and in violation of the provisions of said "Unfair Sales Act", except to meet in good faith the prices of competitors who are selling the same articles or products of comparable quality at cost to them as retailers as defined in the Oklahoma "Unfair Sales Act", and except in instances of other

exempted sales as provided in Section 598.6 of said Oklahoma "Unfair Sales Act."

It is further ORDERED, ADJUDGED and DECREED by the Court that said defendant, Safeway Stores, Inc., a foreign corporation, and the agents, servants, clerks and employees of said defendant, and all persons acting by or under the authority of said defendant, be, and they are each hereby perpetually enjoined and restrained from advertising the giving or issuance of, and giving or issuing, any trading stamps, cash register receipts, or other evidences of credit issued as a discount for prompt payment of cash, of a value in "excess of three percent" of the selling price of any merchandise handled by defendant, with the sale of any merchandise advertised for sale, offered for sale, or sold by said defendant at cost to the retailer as defined in the Oklahoma "Unfair Sales Act".

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant's application for a permanent injunction against the plaintiff, Louie J. Speed, Inc., d.b.a. Speed's Food Market #1, to enjoin said plaintiff from giving or issuing single trading stamps with articles of merchandise advertised or sold at cost to the retailer as defined in the Oklahoma "Unfair Sales Act", be, and the same is hereby denied.

It is further ORDERED, ADJUDGED and DECREED by the Court that the plaintiff, Louie J. Speed, Inc., d.b.a. Speed's Food Market #1, and the agents, servants, clerks, and employees of said plaintiff, and all persons acting by or under the authority of said plaintiff, be, and they are

each hereby perpetually enjoined and restrained from advertising the giving or issuance, of, and giving or issuing, any trading stamps, cash register receipts, or other evidences of credit issued as a discount for the prompt payment of cash, of a value in excess of three percent of the selling price of any merchandise handled by plaintiff, with the sale of any merchandise advertised for sale, offered for sale, or sold by plaintiff at cost to the retailer as defined in the Oklahoma "Unfair Sales Act".

It is further ORDERED by the Court that the plaintiff, Oklahoma Retail Grocers Association, Inc., a corporation, recover of the defendant, Safeway Stores, Inc., a foreign corporation, its costs in this action, taxed at $236.70.

To all of which findings, orders, judgment, and decree, the defendant EXCEPTS, and its EXCEPTIONS are allowed.

ENTERED in open court on October 21st, 1955; and signed this 9th day of December, 1955.

F. B. H. SPELLMAN

F. B. H. SPELLMAN
Assigned District Judge.

3. Oral Opinion of the District Court of Oklahoma County, State of Oklahoma.

BY THE COURT:

Gentlemen, as the Court understands it, this is an action wherein plaintiff, as a Trade Association, sues the defendant, Safeway Company, praying for an Order restraining the defendant from violating the provisions of the Oklahoma Unfair Sales Act, as set out in Title 15, O.S.A., Sections 598.1 to 598.11, inclusive, in the following particulars: That the defendant, Safeway, did, on certain dates, as set forth in the Petition of the plaintiff, advertise, offer for sale, and did sell certain articles of merchandise at retail at less than cost to the retailer, as defined in the Unfair Sales Act, with the wrongful intent and purpose of inducing the purchase of other merchandise or arbitrarily diverting trade from members of the plaintiff Association, competitors of the defendant, and otherwise injuring members of the plaintiff Association, with the wilful malicious and unlawful intent and purpose of impairing and preventing fair competition, injuring members of the plaintiff Association, and injuring the public welfare,—as to specific dates,—places of locations,—the specific dates running from September 15, 1954 to October 22, 1954, and occurring in the cities of Oklahoma City, Enid, Norman, Tulsa and Shawnee.

The defendant, Safeway, for its answer, admits its corporate existence, as well as the corporate existence of the plaintiff, and for further answer denies the advertising, offering to sell, or sale of two certain items, but it admits

that it did, as alleged by the plaintiff, advertise, offer for sale and sell, all of the other items set forth in Exhibit "B" to plaintiff's Petition upon the dates and at the places and for the prices set forth in the plaintiff's exhibit and made a part of this Petition.

The defendant, Safeway, denies that such was in violation of the Unfair Sales Act, but that the same was made in good faith to meet the price of a competitor, or competitors, who were, on those dates, selling the same articles or products of comparable quality at such prices.

The defendant, for further answer, denied that it sold any of said articles at a reduced price with an unlawful intent or purpose.

The defendant, Safeway, for further answer, alleges that Louie J. Speed, doing business as Speed's Food Market, and others, were, on the same dates as set forth in the plaintiff's Petition, as competitors of the defendant Safeway, offering for sale and selling like merchandise at the prices set forth in their Cross-Petition, and on the dates of such sales certain Association members were giving to their customers trading stamps or coupons, redeemable cash register receipts and other evidences of credit, without making or collecting any additional charge therefor, and that such had a cost value of not less than 2.8 per cent of the sellers' price, and that on Wednesday and Friday such evidence of credit had a cost value of not less than 5.8 per cent, and that the Safeway, defendant, had adjusted its prices on articles alleged to have been offered and sold to meet such competition.

And also, Safeway alleges that in certain other towns, other than in Oklahoma City, that it adjusted its prices to meet competition of other grocers in those communities.

Further answering, the defendant, Safeway, states that if it was not justified in meeting competition in this manner that then the giving of such evidences of credit without additional charge had the effect of offering for sale and selling at less than the minimum mark-up, and was in violation of the Unfair Sales Act.

The defendant Safeway, Cross-Petitions against Louie J. Speed, doing business as Speed's Food Market, and twelve other members of plaintiff Association, alleging that those named parties, in the giving of trading stamps and other evidences of credit, caused and,—caused to be advertised for sale, and did sell, certain merchandise at less than the statutory mark-up and in violation of the provisions of the Unfair Sales Act, and the defendant Safeway, likewise prays for a permanent injunction.

For the purpose of this trial, it was agreed,—it was Ordered by the Court, that the issues as between plaintiff Association and Safeway, and as between Safeway and Speed, be tried together.

The Cross-Defendant, Speed, for answer to the Cross-Petition of Safeway, denies that he has violated any provisions of the Unfair Sales Act, and alleges that he had been, for a number of years, following the practice of allowing his customers a uniform store-wide discount for cash, either at the time of purchase or not less than the

15th of the following month, which had been accomplished by the issuance of S & H Green,—S & H Trading Stamps, furnished to him by the Sperry & Hutchinson Company, and which were redeemable, by the S & H Company, which discount was approximately 2.5 per cent.

First of all, I think that briefly states the issues set up by the pleadings,—first of all, there is no doubt of the right of the plaintiff to maintain this action. Section 598.10 specifically grants this authority. It appears from the pleadings and the evidence that members of the Association consist of approximately 1,700 independent merchants throughout the state, with more than 200 in the Oklahoma City area.

Now it is necessary that the Court consider the Unfair Sales Act, which Act has been declared to be constitutional by our Supreme Court. Now Section 598.2 is the definition section of the statute,—Section 598.3 prohibits sales below cost. That section reads: "It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this Act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare, are unfair competition and contrary to public policy and the policy of this Act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to create a monopoly in any line of commerce".

Section 598.4 is a penal section of the statute, providing that any violation is a misdemeanor, and fixing punishment.

Section 598.5 provides injunctive relief that may be had through the courts; section 598.6 sets out the exempted sales.

Section 598.7 has to do with meeting competitors' prices,—"Any retailer or wholesaler may advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article or products of comparable quality or cost to him as a wholesaler or retailer".

Section 598.8 is determination of cost of sale outside ordinary channels of trade.

Section 598.9 provides for witnesses,—production of books, records, and so forth.

Section 598.10,—I have talked about that,—Trade Associations. Any individual, or a trade association, may bring an action in court.

As I see it, what is before the Court at this time is,—first,—did the defendant, Safeway Company, sell below the statutory price as determined and fixed by the Unfair Sales Act? Second,—if so, was it justified under the terms of the Act? Third,—or was it done with intent to innure competitors and lessen competition? Fourth,—the defendant, Safeway, admits the sale of various articles for the prices set forth in the exhibits attached to plaintiff's Petition, but that they reduced such prices only to meet the

competition of those,—of the plaintiffs who were giving trading stamps here in the Oklahoma City area, and in Enid, Shawnee, and other places, because other retailers had reduced prices.

In reply, the plaintiff and Cross-Defendant, Louie J. Speed admits that he gave trading stamps on the basis of one stamp for each ten cent purchase and as inducement for cash payment or payment not later than the 10th of each month, but that the sale price of the article was not below the statutory mark-up described in the statutes.

Six,—if the giving of the trading stamps is a violation of the statute, that is, if it had the effect of reducing the price below the statutory mark-up permitted by statute, then the Cross-Petitioner violated the law and should be enjoined.

Seven,—if the giving of the trading stamps is illegal and in violation of the Unfair Sales Act, was the defendant, Safeway Company, justified in reducing its price so as to meet such prices?

Eight,—if the giving of trading stamps was not a violation of the statute, that then the defendant, Safeway Stores, violated the law and should be enjoined.

Now as I further understand it, a violation of the Unfair Sales Act arises where a retailer, first, sells below his cost, as that term is defined in the Act; second, without legal justification; third, with the intent condemned by the Act. If there was a sale below cost,—if so,—then there would be a violation of the statute, and it should be stopped.

A retailer may sell below his cost without violating this Act, to meet the lawful price of his competitor, but cannot sell below his cost on this excuse when the price of a competitor is an unlawful price,—that is, one violation of the law will not justify another,—which raises the next question, of whether or not there was a legal justification.

The justification sought is that the thirteen members of plaintiff Association were giving trading stamps, that is, thirteen out of some,—well, many others.

It is admitted that only a small minority of plaintiff members give trading stamps or other evidences of like character, and the facts are that these who give the stamps or other evidences of credit, give them on a general store-wide basis, that is, they may have certain so-called traffic items on which the mark-up is very close to the specified minimum, while most of the other merchandise has a greater mark-up.

And further, the defendant, Safeway, admits that the items complained of were advertised, offered for sale and sold for less than statutory mark-up.

Safeway is in a peculiar position in this case, alleging on one hand that it reduced its prices to meet lawful competition, while on the other hand it is alleged that the giving and distribution of trading stamps reduced the price, and were illegal,—that they reduced the price below the statutory minimum.

The defendant, Safeway, contends that in the cities of Norman, Shawnee, Enid and Tulsa, on the date set out in

the Plaintiff's Petition, it reduced the prices on the various items complained of to meet competition, contending that it could only presume that the prices it was meeting were legal prices. I don't think that is a logical presumption, gentlemen, for here we have one of the largest chains of grocery stores, who undoubtedly, because of their size, can buy as cheap or cheaper than anyone else.

The statute on meeting competitors prices reads,—I will read it again,—quote, "Any retailer or wholesaler may advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article or products of comparable quality at cost to him as a wholesaler or retailer".

As I understand the Act, that if,—Store "B" out here has been able to make a good deal,—a bona fide deal,—then Store "C" would be permitted to meet that competition,—that is the way I understand the situation.

The logical presumption, gentlemen, seems to me would be that the defendant, Safeway, should know that something was wrong with the compeitor's price. As I say, they can probably buy as cheap, or cheaper, than anyone else, and should know that there was something wrong.

Safeway's remedy in that case would be redress through the courts; that is why we have the Unfair Sales Act,—that is what the courts are here for,—and that is what has been done since the inception of this action. I granted the restraining orders as against the Cross-Defendants, and indicated that I would grant them against any of the plaintiff's members, on a Motion or Application of the

Safeway, and in the ones in which the Court has acted,—taken action,—every one of them,—the Court has been dilligent in providing relief and issuing the injunctions.

The Court knows this, as a matter of personal knowledge, that separate actions have been filed in my own home District,—in Enid,—Alva,—Watonga,—restraining other retailers from violating the provisions of the Unfair Sales Act at the instance and behest of the,—upon the Petition of the Safeway Company,—and as I say, in that particular case counter-restraining orders have been issued.

Gentlemen, to attempt to handle these problems in any other manner couldn't have any other effect than to bring chaos. First, Safeway sets a price,—Blakemore, in my District, reduces it; Safeway says they are going to meet it,—the Red Bud then reduces their price,—and there we go,—you would have nothing but chaos, gentlemen,—one violation just brings about another. I say to handle it in any other manner except in the orderly manner as provided by the statute will only bring chaos in the grocery business and have the net results of ruining hundreds, if not thousands, of small independent merchants, and that is the only logical conclusion the Court can come to there.

Now we have this proposition,—the Statute, Section 'c' of 598.5 reads, "Evidence of advertisement, offering to sell, or sale of merchandise by any retailer or wholesaler at less than cost to him, shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition". As I understand the rule of law, that is prima facie evidence, and that, that evidence can then be

rebutted by the person charged, that he was not doing that,—to start out with that the prima facie evidence that the defendant, Safeway, was doing that with the purpose of injuring competitors or destroying or substantially lessening competition.

Now Mr. Christensen was on the stand, and stated that it was not their intention to injure competitors,—it was merely to be competitive, and that another reason was to secure a court decision. That, to my mind, gentlemen, is not proper; that is not the way to transact business,—not the way to treat the courts. They had a remedy of coming in and asking for a restraining order and trying it out, and not violating the law, but he goes on and says that they had no intent to hurt anybody; they didn't prosecute,—they didn't seek an injunction,—they just cut prices.

Now you gentlemen all know,—most of you have had as much experience as the Court has had, and some of you a lot more,—it is awfully hard to establish intent,— what a person has in their mind, what they intend to do,—in fact, intent is a state of mind. I don't know how you can prove it by direct evidence. Very seldom you can prove intent, unless the party admits it, except from circumstances,—what went on. Mr. Christensen said,—he made this statement on cross examination,—that it was the policy of their Company to cut prices regardless of illegality. It isn't right for a large Company like this, to do this, and at the same time Mr. Christensen also stated that he had never read the Unfair Sales Act,—hadn't read it to date,—last Monday or Tuesday. You can only arrive at

intent by,—largely by circumstances, as I have stated,—it is one way one time and another way another time.

And now we get to the question of trading stamps; does the giving of trading stamps, redeemable in merchandise, constitute a violation of the Unfair Sales Act when stamps are given with commodities sold at the minimum price permitted under the Act? Section 598.2, one of the definitions,—"When used in this Act, the term 'cost to the retailer' shall mean the invoice cost of the merchandise to the retailer or the replacement cost of the merchandise to the retailer, whichever is the lowest, less all trade discounts except customary discounts for cash."

I think this can be answered by a consideration of the nature of the purpose of the trading stamp coupons, whether they are to be regarded as a discount for cash or a means of advertising or to intice customers or to retain your trade, or do they simply represent a cut in the sale price of the articles with which they are given. There is no doubt that if it is the latter, they would accomplish a cut in price, and the sale of such merchandise sold at the minimum allowed under the Act and the giving of stamps would amount to a sale below the minimum.

Now on the other hand, if the stamps are given in the nature of an inducement to attract customers to the store, or in the nature of advertising, an advertising device, or as a cash discount for cash,—can they be condemned and found to be in violation of the Unfair Sales Act any more than free parking, musical programs, care of children, and all the other thousand and one promotional schemes

that we have. It is not evidence in this case, but the court can read, and knows what is going on. This week I noticed an advertisement in the Daily Oklahoman where a group of merchants out here were giving everything from gold fish to trips to Havana, Cuba,—it seems to be the practice to give something, and people are looking for it; they are not interested in the cash reduction,—it wouldn't make any difference to them,—they are looking for something like these premiums that are set out in these catalogues,—that is what they are looking for,—it seems to be the custom now. Doctor Johnston says it is bad business,—he may be correct on that,—they may all go broke with these give-away processes that they are in. But he also says that if it pleases the customer, it is good business,—so there we are again. Personally, I don't think it is very good business, but that is their troubles. I don't think it is a prerogative of this Court to try to tell any merchant what is good or bad business,—the way he runs it,—as long as it is not a violation of the statute.

So if these other things I have just mentioned are not condemned, or cannot be condemned,—merely promotional schemes for advertising, I don't believe that the giving of the stamps with cash payment or for cash to be paid in a certain length of time would be a violation. They are in the nature more for prompt payment, it would seem to me to be. These stamps have been in use for a long time, I think some evidence has been introduced that they have been in use in Oklahoma for some forty-five years,—Mr. McCarty said he had been here twenty-two years, in charge of it, working with it. An examination of the contract

here with Speed reveals that they are a cash discount; as I understand it, a means of providing a cash discount. Cash is not given, the stamps are given on the basis of one stamp for each ten cent purchase, and when you have a book, when you have made $120.00 in purchases you have accumulated a book of stamps that will account for about $3.00 on some premium that the good housewife, and not unfrequently I expect the husband, gets something that they otherwise would not have gotten.

Cash discounts have been in vogue for a long time. Purchasers are given the benefit of the traditional cash discount, and the merchant has the reciprocal advantage of trade,—getting his money. Now if he doesn't get his money by a certain time he doesn't give the discount, doesn't give the stamps,—it is not a price adjustment, it is just a mode of financing. It is not a trade discount, nor a rebate, nor a concession. There is no suggestion in the Unfair Sales Act of desire to outlaw the true cash discount; in fact it excludes cash discounts as distinguished with trade discounts.

I would like to state further, on this contract that Speed has with the S & H Company, it specifically provides that they will cancel the contract at any time the stamps are issued in any other manner than which is set forth in the contract, and that is, one for each ten cent purchase.

We have had evidence here by Doctor Johnston,—he says he doesn't think it is good business; it may, or may not be, but he also says if it pleases the customer it is good business,—that seems to be what the people want, and it is not in violation of the provisions of the Unfair

Sales Act,—doesn't reduce the prices. You see, here is what we have, gentlemen,—Speed advertises some merchandise for, say $1.00; the defendant, Safeway, advertises it for, lets say, 97¢, or 98¢, and stands on the theory that they are meeting the green stamp competition. That appears in the public press,—in the newspapers; it appears on the shelf. The only thing that the purchaser sees is that the article is priced at 98¢; he doesn't give any further thought to the trading stamp,—he just sees that the other man has it two cents cheaper.

So you can see how the reduction of price,—what effect it has on the human eye, or the human mind. We go too far on competition. Sometimes I am afraid it is hard to distinguish where competition stops and greed and avarice take over. We know the terrible competition that is going on now in this country in the automobile industry. It looks as though there won't be but three of them left. If two of them have their way, there will only be two of them, and if one of them has its way, there will only be one,—so I say, it is hard to tell, sometimes, where competition stops and greed and avarice take over. That is the purpose of the Unfair Sales Act. We have had it,—it has been in vogue in this country,—it has been going for the last fifty or more years, to provide fair competition and protect the public, because too often,—and it has been shown many times in the history of this nation,—that when it is 'all out', the picture changes, and the public pays.

The Court therefore finds that on the dates alleged in plaintiff's Petition, the defendant, Safeway, did advertise and offer for sale, and did sell the items of merchandise

set forth and at a price below the minimum prices as fixed by the Oklahoma Unfair Sales Act.

The Court further finds that on the dates alleged in plaintiff's Petition, the defendant, Safeway, without legal justification, wilfully and intentionally reduced its prices in an effort to increase its volume, to the detriment of other grocers.

The Court further finds that the Cross-Defendant, Louie J. Speed, did not, on the dates alleged, advertise, offer for sale or sell the merchandise alleged at a price lower than that described and permitted by the Unfair Sales Act.

The Court further finds that the giving of trading stamps, in accordance with the conditions of the trading stamp contract, is in the nature of a cash discount, and is not in violation of the Unfair Sales Act.

And the Court concludes that the injunction be made permanent against the defendant, Safeway Company.

We have had, heretofore, some complaint about double stamps. I think that part of the restraining order should also be continued and made permanent, to avoid any further trouble on that issue, either whether they are cash-saver coupons, or what they are. I am afraid somebody will get off the reservation and misunderstand what the Court has in mind. We will continue that part and make it permanent as to Speed.

Now the other defendants,—or the other Cross-Defendants, this being the date,—those cases were continued until the 17th,—that part of the restraining order should be continued in full force and effect until further hearing.

APPENDIX B

SALES BELOW COST

Unfair Sales Act

OKLAHOMA STATUTES, 1951, TITLE 15, CHAPTER 14, SECTIONS 598.1-598.11

Short Title

Section 598.1. This Act[2] shall be known and designated, and may be cited as the "Unfair Sales Act."

Definitions

Sec. 598.2. (a) When used in this Act,[2] the term "cost to the retailer" shall mean the invoice cost of the merchandise to the retailer or the replacement cost of the merchandise to the retailer, whichever is the lower; less all trade discounts except customary discounts for cash; to which shall be added (1) freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (2) cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths (¾) of one per cent (1%) of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage, and taxes, (3) all State and Federal taxes not heretofore added to the cost as such, and (4) a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be six (6%) per cent of the cost of [to] the retailer as herein set forth after adding thereto freight charges and cartage but before adding thereto a markup.

(b) When used in this Act, the term "cost to the wholesaler" shall mean the invoice cost of the merchandise to the wholesaler, or the replacement cost of the merchandise to the wholesaler, whichever is the lower; less all trade discounts except customary discounts for cash; to which shall be added, (1) freight charges, not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (2) cartage to the retail outlet if done or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths (¾) of one per cent (1%) of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage, and taxes, and (3) all State and Federal taxes not heretofore added to the cost as such.

(c) When used in this Act the term "replacement costs" shall mean the cost per unit at which the merchandise sold or offered for sale could have been bought by the seller at any time within thirty (30) days prior to the date of sale or the date upon which it is offered for sale by the seller if bought in the same quantity or quantities as the seller's last purchase of said merchandise.

(d) When one or more items are advertised, offered for sale, or sold with one or more other items at a combined price, or are advertised, offered as a gift, or given with the sale of one or more other items, each and all of said items shall for the purposes of this Act be deemed to be advertised, offered for sale, or sold, and the price of each item named shall be governed by the provisions of paragraphs (a) or (b) of Section 2, respectively.

(e) The terms "sell at retail," "sales at retail," and "retail sale" shall mean and include any transfer for a valuable consideration made in the ordinary course of trade or in the usual prosecution of the seller's business of title to tangible personal property to the purchaser for consumption or use other than resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(f) The terms "sell at wholesale," "sales at wholesale," and "wholesale sales" shall mean and include any transfer for a valuable consideration made in the ordinary course of trade or the usual conduct of the seller's business, of title to tangible personal property to the purchaser for purposes of resale or further processing or manufacturing. The above terms shall include any transfer of such property where title is retained by the seller as security for the payment of the purchase price.

(g) The term "retailer" shall mean and include every person, partnership, corporation or association engaged in the business of making sales at retail within this State; provided that, in the case of a person, partnership, corporation or association engaged in the business of making both sales at retail and sales at wholesale, such term shall be applied only to the retail portion of such business.

(h) The term "wholesaler" shall mean and include every person, partnership, corporation, or association engaged in the business of making sales at wholesale within this State; provided that, in the case of a person, partnership, corpora-

tion or association engaged in the business of making both sales at wholesale and sales at retail, such term shall be applied only to the wholesale portion of such business.

Sales Below Cost Prohibited in Certain Cases

Sec. 598.3. It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this Act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impair and prevent fair competition, injure public welfare are unfair competition and contrary to public policy and the policy of this Act, where the result of such advertising, offer or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.

Punishment for Sales Below Cost

Sec. 598.4. Any retailer who shall, in contravention of the policy of this Act, advertise, offer to sell or sell at retail any item of merchandise at less than cost to the retailer as defined in this Act; or any wholesaler who shall in contravention of the policy of this Act, advertise, offer to sell, or sell at wholesale any item of merchandise at less than cost to the wholesaler as defined in this Act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than Five Hundred Dollars ($500.00).

Injunctive Relief—Damages—Prima Facie Evidence

Sec. 598.5. (a) In addition to the penalties provided in this Act, any person injured by any violation, or who shall suffer injury from any threatened violation of this Act, may maintain an action in any court of equitable jurisdiction to prevent, restrain or enjoin such violation or threatened violation. If in such action a violation or threatened violation of this Act shall be established, the court shall enjoin and restrain or otherwise prohibit, such violation or threatened violation and, in addition thereto, shall assess in favor of the plaintiff and against the defendant the costs of suit. In such action if damages are alleged and proved, the plaintiff in said action, in addition to such injunctive relief and costs of suit, shall be entitled to recover from the defendant the actual damages sustained by him.

(b) In the event no injunctive relief is sought or required, any person injured by a violation of this Act may maintain an action for damages alone in any court of general jurisdiction, and the measure of damages in such action shall be the same as prescribed in subsection (a) of this Section. Provided this Act shall not authorize suits or actions against newspapers, radio broadcasters, or other advertising agencies through which such advertisements are published, broadcast or otherwise made.

(c) Evidence of advertisement, offering to sell, or sale of merchandise by any retailer or wholesaler at less than cost to him, shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

Exempted Sales

Sec. 598.6. The provisions of this Act, shall not apply to sales at retail or sales at wholesale.

(a) where seasonable merchandise is sold in bona fide clearance sales, if advertised, marked, and sold as such;

(b) where perishable merchandise must be sold promptly in order to forestall loss;

(c) where merchandise is imperfect or damaged or is being discontinued and is advertised, marked and sold as such;

(d) where merchandise is sold upon the final liquidation of any business;

(e) where merchandise is sold for charitable purposes or to relief agencies;

(f) where merchandise is sold on contract to departments of the government or governmental institutions;

(g) where merchandise is sold by any officer acting under the order or direction of any court;

(h) where merchandise is sold at any bona fide auction sale.

Meeting Competitor's Prices

Sec. 598.7. Any retailer or wholesaler may advertise, offer to sell, or sell merchandise at a price made in good faith to meet the price of a competitor who is selling the same article or products of comparable quality at cost to him as a wholesaler or retailer. The price of merchandise advertised, offered for sale or sold under the exemptions

specified in Section 6, shall not be considered the price of a competitor and shall not be used as a basis for establishing prices below cost, nor shall the price established at a bankrupt sale be considered the price of a competitor within the purview of the first sentence of this Section.

Determination of Cost in Case of Sale Outside Ordinary Channels of Trade

Sec. 598.8. In establishing the cost of merchandise to the retailer or wholesaler, the invoice cost of such merchandise purchased at a forced, bankrupt, closeout sale, or other sale outside of the ordinary channels of trade, may not be used as a basis for justifying a price lower than one based upon the replacement cost of the merchandise to the retailer or wholesaler, within thirty (30) days prior to the date of sale, in the quantity last purchased through the ordinary channels of trade.

Witnesses—Production of Books, Records, Etc.

Sec. 598.9. Any defendant, or any witnesses, in any civil action brought under the provisions of this Act may be required to testify, and any defendant, or any witness, may, upon proper process, be compelled to produce his books, records, invoices and all other documents of any such defendant or witness into court and the same may be introduced as evidence, but no defendant, or any witness in such civil action shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may thus be required to testify or produce evidence, documentary or otherwise,

and no testimony thus given or produced shall be received against him upon any criminal proceeding or investigation.

Trade Association May Sue

Sec. 598.10. Any duly organized and existing trade association, whether incorporated or not, is hereby authorized to institute and prosecute a suit or suits for injunctive relief and costs, provided for under the terms of this Act, as the real party in interest for and on behalf of one or more of said association's members, when violation of this Act directly or indirectly affects or threatens to affect or injure such member or members, or where violation of this Act threatens to impair fair competition or otherwise affects such member as herein provided.

Partial Invalidity

Sec. 598.11. If any subsection, sentence, clause, word, phrase or provision of this Act shall for any reason be held invalid or unconstitutional, the validity of the remaining parts hereof shall not be affected thereby and to that end the provisions of this Act are declared to be severable.